other; that if there should be a likeness in feature, there may be a difference in the voice, gesture, or other characters; whereas family likeness runs generally through all of these; for that in everything there is a resemblance, as of feature, voice, attitude, and action. Might he have not added the diathesis of the brain? He doubtless might if the point had been mooted. In prosecutions for bastardy, the practice in the Quarter Sessions was, in my day, not exactly to give the child in evidence, but to put it before the jury, sometimes by the prosecutor, and sometimes by the putative father. But ancestral irregularity in the action of the brain is more frequently transmitted than any resemblance in form or feature; and it is difficult to imagine an objection to evidence of it for purposes of corroboration.

The defendant excepted to the foregoing ruling; but examined witnesses who had been in familiar intercourse with the testator during many years without having observed anything strange or eccentric in his conduct; and the jury, having been out fifty hours, declared they never could agree; whereupon they were discharged.

Philadelphia Common Pleas. February, 1853.

BOROUGH OF FRANKFORD ET AL. *vs.* LENNIG.

1. The Board of Wardens of the Port of Philadelphia, under the acts of 1803 and 1818, have jurisdiction to authorize the construction of wharves, &c., in the river Delaware, as far north as the mouth of Frankford Creek.
2. But the Board has no jurisdiction out of the tide-way of the river, and cannot authorize such constructions in the creek itself.
3. The Board of Wardens cannot confer any right on the owners of land bordering on the river, to encroach upon its channel, so as to create a *purpresture*, or public nuisance.
4. The owners of land in Pennsylvania, bordering on a navigable river, have not the right of soil to the centre of the stream. They have, however, the right to erect wharves or buildings to ordinary low water mark; and this right, in the port of Philadelphia, is not, it seems, dependent on the license of the Board of Wardens.

5. A gradual alteration of the channel of a navigable stream will control the rights of the owners of adjacent land to erect wharves therein.

6. A court of equity will not interfere by injunction in the case of a public nuisance, where there exists any doubt of the character or legality of the act complained of, but will leave the parties to an indictment, or direct an issue.

The facts of this case appear in the opinion of the Court, which was delivered by

ALLISON, J.—The complainants in the bill filed are the Council and inhabitants of the Borough of Frankford, in the County of Philadelphia, and Amos Thorp, Albert G. Roland, Nathan Hillis, and James Brooks;—they complain that the respondent has interfered with and obstructed the navigation of the Frankford Creek; first, by a wharf constructed in the year 1843, along the south bank, and, as they assert, at one or more points into the channel of the stream; and by a continuation of said wharf now, or at the time the bill was filed, in progress of construction, of the additional length of 635 feet, which, with a pier 30 feet long by 50 feet in breadth, built at the eastern termination of the wharf, in five feet water at low tide, and in the mouth of the Creek, makes the new construction 665 feet in length from the eastern end of the old wharf.

The complainants further charge that about one-third of the extension is carried, in part, into the bed or channel of the Creek beyond low water mark, and crosses it in an oblique northeasterly direction from its southern towards its northern bank or shore, leaving, at the mouth of the stream, a channel of but 15 feet in width between the upper end of the pier and the flats on the northernmost side of the stream.

It is also stated that the Borough of Frankford was incorporated March 17th, 1800; that Frankford Creek, which forms part of the boundary of said Borough, from its mouth to the land opposite the race bridge across the Bristol Road, or Main Street, in Frankford, by an act passed the 16th day of January, 1799, was declared to be a public highway of the width of 66 feet, and that Amos Thorp, A. G. Roland, Nathan Hillis, and James Brooks, citizens of Frankford, have used said creek as a public highway;

that some of them are the owners of valuable real estate, mills and wharf property, fronting on said stream or Tacony Creek, above the bridge, and that a number of the citizens of said borough have, for a long time past, and are now carrying on manufactures of various kinds, and other varieties of business, all of which depend, as well as the value of the property of complainants and others, on the unobstructed navigation of the creek, and communication thereby with the river Delaware.

The bill prays for an injunction to restrain the completion of the wharves, the use or maintenance of the same by respondent, and that he be prohibited from, in any way, lessening the channel of Frankford Creek, or interfering with the free navigation of the same.

The defendant, in his affidavit, alleges that the extension of his wharf and pier have been constructed under a license granted to himself and Frederick Lennig, who constitute the firm of Nicholas Lennig & Co., by the Wardens of the Port of Philadelphia.

Respondent denies that either of the said wharves are, or will be, an obstruction to the navigation of the Creek; that his only object has been to deepen its channel, and thereby improve its navigation. He also says that the wharf built in 1843 does not encroach upon the channel of the stream, and that the mouth of the Creek had been deteriorating for a number of years, by deposits of mud, especially on its northern shore; that, by the wharf last built, the channel will be deepened, by preventing the spread of the water over the flats upon the lower side, where it empties into the Delaware; that it will, not only not interfere with the action of the tidal current in entering the Creek, but improve it, and that he has removed the deposits of mud from the channel at the outlet, greatly to its advantage.

The affidavit of defendant further states, that in 1843, when the first wharves were built, the current of the Creek at the mouth was to the north of the pier and wharf now being built, which, at that time, was dry flat at low water.

Several grave questions arise in the determination of this issue; the first in importance, as it affects not only the controversy in

hand, but other interests of vast magnitude, is the protection claimed by the respondent, under the license issued by the Wardens of the Port of Philadelphia, bearing date the 6th day of December, A. D. 1852, which authorizes "Nicholas Lennig and Company, of Bridesburg, Philadelphia County, to erect a pier or wharf in the river Delaware, at the mouth of Frankford Creek, not to exceed 30 feet long and 50 feet broad, in accordance with the following described lines and boundaries, to wit: commencing on a line with the piles, as driven along the south side of said creek, at the distance of 635 feet from the east end of his wharf on said creek, as per plan on file in this office," &c. The act establishing the Board of Wardens for the Port of Philadelphia, was passed the 29th day of March, 1803. The Board consisted of one Master and six Assistant Wardens, four of whom were required to be inhabitants of the City of Philadelphia, one of the Northern Liberties, and one of the District of Southwark.

The 12th section of the act provides, "that when and so often as any person shall be desirous to extend any wharf or other building, of the nature of a wharf, or cause any such wharf or building to be made in the tide-way of the river Delaware, from any part of the City or *Liberties* of Philadelphia, such persons shall make application to the Board of Wardens," &c. The only other act defining in terms the authority of the Wardens, as applicable to this part of the case, is the supplemental law of February 7th, 1818, which differs from the act of 1803, principally, in expressing, with more minuteness, the extent of their territorial jurisdiction, embracing the City of Philadelphia, the Northern Liberties, the District of Southwark, and Sand Bar Island, in front of the City. It is becoming important, therefore, to ascertain what was intended by the Legislature, by the terms *Liberties* and *Northern Liberties*, as used in the connection in which they stand.

By the conditions or concessions agreed upon in England, on the 11th of July, 1681, between William Penn and the purchasers of land in the province, the proprietary was to lay out a large town or city, in the proportion of 200 acres of land for every 10,000 acres bought from him; and each purchaser became entitled to 10

acres in the city for every 500 acres thus acquired; this plan was found to be impracticable, and a compromise was agreed upon. Penn directed a survey of over 16,000 acres, which lay to the north, west, and south of the city, for the use and benefit of the first adventurers, and were designated the *Liberties*, or liberty lands of Philadelphia. Under the new system, original purchasers of 500 acres became entitled to 490 acres in the county, and 10 acres of liberty land on the west, or 3 acres on the east of the Schuylkill, and a city lot embracing about one-third of an acre.

The original survey of these lands was lost at an early period, and, in 1703, a warrant was issued for a re-survey of all the lands within said Liberties, and the manor of Springetsbery, according to their original lines of survey, or the present boundaries of the several tracts possessed by the settlers therein. An ancient plan of the Northern Liberties, including the manor of Springetsbery, supposed to be a return to said survey, is endorsed. This belongs to the Surveyor General's office, Northern Liberties. From these historical facts, it is evident that the terms incorporated in the acts of 1803 and 1818 had, at a very early day, a well determined signification, coeval in their origin with the birth of the colony, and, like the colony itself, undergoing in later years a material alteration; nor does it detract from the force of the argument, that the original boundaries of the liberty lands are involved in some degree of obscurity; for the best lights to which access can now be had, Holmes' Map of 1687, and Reed's Map, with explanations, published in 1774, after tracing their boundaries, as "beginning on Vine Street, then up the river Delaware to the mouth of Coachquenawque, or Pegg's Run, they then receded from the Delaware, to avoid the lands at Hartsfelder; now the incorporated District of the Northern Liberties, embracing 350 acres, and located six years before Penn's colony came out under a patent from Governor Andros; and also the settlement at Shackamaxon, now Kensington; whether they again touched the Delaware is a matter of some doubt; but it is certain they extended north to the Frankford Creek, below the junction of the Tacony and Wingohocking, and covered the whole of the territory westward, afterwards known

as the Northern Liberties, and subsequently as the township of the Unincorporated Northern Liberties, a term which was applied to the Delaware front north of the City, including the lands of Hartsfelder, and others not embraced in the original survey of the liberty land to the mouth of Frankford Creek, and westward to the Schuylkill River.

As early as 1768, the Provincial Assembly passed an act for raising, by lottery, £1000, for purchasing a public landing in the Northern Liberties.

Then follow a series of legislative acts, establishing, beyond controversy, the meaning of the term as applicable to the Delaware front above the City, some of which may be referred to in the following order:

First, the act of 30th, 1791, empowering the inhabitants of that part of the township, between Fourth Street and the Delaware, and Vine Street and Pegg's Run, to make regulations for lighting, &c.

March 28th, 1803.—An act was passed incorporating "The Commissioners and Inhabitants of that part of the township of the Northern Liberties, lying between the west side of Sixth Street and the river Delaware, and between Vine Street and Cohocksink Creek."

The act of March 16th, 1819, changing the name of the incorporated district to its present title, and its western boundary to the middle of Sixth Street. The first section of the act of March 6th, 1820, incorporates "The Commissioners and Inhabitants of the Kensington District of the Northern Liberties." Richmond District, February 27th, 1842, was carved out of the "Township of the Unincorporated Northern Liberties." And latest in order is the act of April 1st, 1848, which provides "that the inhabitants of that part of the township of the Unincorporated Northern Liberties, in the County of Philadelphia, known as the Village of Bridesburg, be and the same is hereby erected into a borough, &c. Beginning at the junction of Frankford Creek and the river Delaware," &c.; covering the very point in controversy. The recital of these acts of Assembly is, we think, a conclusive answer to the

argument so strenuously pressed against the right of the Wardens to exercise their functions beyond the limits of the incorporated District of the Northern Liberties, or Cohocksink Creek, where it empties into the Delaware.

But, although free from doubt upon the question of the jurisdiction of the Wardens, as far north as the mouth of Frankford Creek, it is equally clear that the respondent has exceeded the privilege granted by the license, for the Wardens have authorized nothing more than a right to build a wharf or pier, 30 by 50 feet, in the river Delaware, commencing 635 feet from the old wharf: we look in vain to the license for a grant to build the connecting wharf in the mouth of the Creek, or Delaware River below low water mark, a distance, perhaps, of 200 feet. To low water mark the respondent is owner of the soil, and has a right to build of his own motion. In Pennsylvania the land, covered at high and bare at low tide, belongs to the owner of the adjacent soil. *Frestang* vs. *Powell*, 1 Wharton, 528; *Jones* vs. *Janney*, 8 W. & S. 443; *Naglee* vs. *Ingersoll*, 7 Barr, 201. And he has a right, in a port town within this limit, to erect a wharf for his own convenience or profit.

The public have, however, an easement over this space, until rescued by the owner, and appropriated to his own use; for, when covered with water, it is a part of the river, and any one can navigate, fish, pass, or repass over it at high tide. Flats have always been considered an appurtenance to an adjoining river front, and pass by a conveyance of the fast land, unless expressly excluded; but, being part of the navigable bed of the river at high water, the State has always claimed to control its use, as part of the common highway; but this does not appear to be the case with us, for the act of 1803, first directing a license to be obtained for building a wharf in the tide-way of the Delaware, afterwards, in prescribing its penalty, says, if any person shall build, &c., *below low water mark, &c.* The act of 1818, it is true, contains no such qualification, but Judge Bell, delivering the opinion of the Court in *Naglee* vs. *Ingersoll*, gives this construction to that act, and says, the failure to recognise the owner's right to build his wharf to low water mark, without the permission of the Wardens, was, perhaps,

an inadvertance, and then holds that "to low water mark he might build of his own mere motion, further than that his violation was dependent upon, and to be governed by, the discretion of others, whom the lord of the soil has intrusted with jurisdiction over the subject."

The act of April 15th, 1850, expressly limits the authority of the Wardens to beyond low water mark; it provides that the 5th section of the act of February 4th, 1846, "shall not be construed to diminish the powers and authorities of the Board of Wardens, relating to the extension of wharves *beyond low water mark*, into the tide-way of the Delaware, as conferred by the act of February 7th, 1818."

And, in further support of this view of the law, might be cited the analogous act of 20th March, 1805, conferring on the Wardens like power to regulate the wharf lines upon the river Schuylkill, from the lower falls of the Delaware, *beyond common low water mark.*

For two-thirds of the construction then between the pier and old wharf, it was altogether unnecessary for the respondent, under any view of the case, to ask as a right of others, that which belonged exclusively to himself; and, it is clear, that between these points no license was attempted to be granted by the Wardens; it would even seem the respondent so understood it, from the fact of the piles, along the south side of the creek, having been driven by him, before the warrant now set up as his protection was obtained.

The erection of the connecting wharf therefore, so far as it extends into the bed of the river below low water, is clearly a *purpresture*, an encroachment and intrusion on the soil belonging to the State; or an effort to appropriate to defendant's individual advantage, a benefit common to the entire community.

The rivers of Pennsylvania are not subject to the common law rule, that owners on the banks have the right of soil to the middle of the stream, and the building of a wharf, without a license from the State, or those to whom it has delegated its authority, into the Delaware, beyond low water mark, is a clear encroachment upon the rights of the public, constituting, as it does, a permanent occupation, without license, of a part of a great public highway.

It may be a question, as to whether the obstruction to the navigation west of the pier is in fact in the river proper, or confined to the creek alone. If the latter, then it is a nuisance beyond all question, extending as it does into and obliquely cross the navigable channel of a highway, which the public are entitled to enjoy free, from all *let* or hindrance; the permission of the Wardens could confer no right to encroach upon the channel of the creek, their jurisdiction extending to the tide-way of the river only, as it now stands. No one can doubt, who examines the premises, that the width of the channel is materially abridged, and although the depth of the waters may be increased by their confinement, as the defendant asserts in his affidavit, yet he cannot, without the sanction of law, be permitted to appropriate to himself that which belongs to the State, or is a privilege, the enjoyment of which is free and unrestricted, upon the ground of alleged improvement; for it is the highway as established by law, which the public have the right to use, and as this wharf crosses what is admitted to have been a navigable part of the stream or outlet of the creek, it is an unauthorized interference with that right.

Nor will the defence set up in the affidavit avail, that the former mouth of the creek was to the north of its present outlet, for it is not denied, that whatever change has taken place has been a gradual one; and it is well settled that the channel follows alterations thus effected; though it would be different if the change had been caused by the sudden action of the water, resulting from flood or an *obstruction* placed in the stream, 3d Kent Com., sect. 428; *Ball* v. *Slack*, 2 Wharton, 541. But where the change is an an insensible one, and the stream, so to speak, selects its own course, the rights of parties are controlled by, and follow such alterations.

The question, however, as to whether the pier constructed under a license, emanating from legal authority is, or is not a nuisance, remains yet to be passed upon; and the affidavits presented by both sides, conflicting and contradictory as they are in the highest possible degree, call for the intervention of another tribunal to determine this question.

As a general rule, Courts of Equity will not interfere where a doubt exists as to the character and illegality of an act complained of, until they have been ascertained by a jury, *Attorney General* v. *Cleaver*, 18 Ves. 218. If a jury should find the pier to be such an obstruction to the navigation, as to amount to a nuisance, the authority under which it has been built, would not avail to prevent its abatement. The Wardens cannot license a nuisance, they cannot close up or seriously impede or obstruct the navigation of a stream declared to be a public highway; no such authority is conferred upon them. As well might it be contended, that a supervisor of roads or streets could improve one highway by blocking up the entrance to another; but for the reason already assigned, we shall turn the parties over to an indictment, or an issue in the Common Pleas, for the purpose of ascertaining whether the pier is or is not a nuisance; and in consequence of the lapse of ten years intervening since the first erection, during which period the complainants may fairly be presumed to have been aware of the alleged wrong, the same disposition is made of this part of the case.

In relation, however, to so much of the new wharf as extends into the channel of the creek, or river Delaware—erected, as we take it to be, without authority of any kind to justify it, and therefore contrary to law; which is prejudicial to the interests of the community and the rights of individuals, an injunction is awarded to restrain its use, occupation or enjoyment by the respondent, or those acting under his authority. This is a much stronger case than *Commonweath* v. *Rush*, 2 Harris 189, in which a special and subsequently a perpetual injunction was granted to restrain defendant building upon a part of a public square, in the city of Pittsburg, which had been sold out in lots by the corporate authorities. And the nuisance is a more obvious one, because more extensive than that for which an injunction was awarded, in *Commissioners* v. *Long*, 1 Parsons 143.

The two cases just cited, and *Jordon* v. *R. R. Comp.*, 3 Wharton 512, establish the damage arising from an obstruction of this kind, to be that which is designated irreparable injury, for which an action at law affords no sufficient remedy.

Upon the questions raised upon the argument, it is sufficient to say we are of opinion—

First. The complainants are proper parties to the bill, and entitled to a standing in Court.

Second. The complainants were not bound to appeal from the decision of the Wardens, and are not therefore concluded by it; the acts of 1803 and 1818, providing that when a license shall be refused, the applicant may appeal. Other parties are not brought within its provisions.

Third. A license to Nicholas Lennig & Co., Nicholas Lennig being dead, Charles and Frederick Lennig, remaining members of the firm surviving, and continuing the business under the old firm designation, and the property belonging to the old firm, is a sufficient authority to respondent to erect the pier designated in the license.

In the Supreme Court of Tennessee.

BELL *vs.* THE STATE.[1]

1. The utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable.

2. In a prosecution for the utterance of obscene language in public, it is not necessary that the words should be proven exactly as charged to have been spoken.

Bell was indicted in the Circuit Court of Blount County for the utterance of grossly obscene language, "in public and in the hearing of divers citizens," the character and precise nature of which are indicated by the opinion. At the September term, 1850, LUCKEY, Judge, presiding, there was a verdict of guilty, and judgment accordingly, and an appeal in error.

John R. Nelson for Bell. An indictment for words spoken, where the words themselves constitute and are the gist of the

[1] This case will be found reported 1 Swan's Tenn. Rep. 42, now about issuing from the press. We are indebted to the kindness of the Reporter for the sheets.